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Allan C. Hutchinson*

Out of the Black Hole: Toward a
Fresh Approach to Tort Causation

The present state of Canadian doctrine on causation in tort law is in serious disarray. Judges and jurists persist in thinking that it is a factual inquiry separate from policy concerns. This is made obvious in the recent Supreme Court decision in Clements and in the academic commentary around it. In contrast, I insist that the requirement of causation must be understood as being entirely part of the broader debate on the goals and policies of tort law generally. Causation is a topic drenched with normative values and should be treated as such.

La doctrine canadienne sur le lien de causalité en droit de la responsabilité civile est en plein désarroi. Les juges et les juristes persistent à croire qu'il s'agit d'une enquête factuelle, distincte des préoccupations politiques. Ce point ressort fortement dans le récent arrêt Clements de la Cour suprême et dans les commentaires doctrinaux sur cet arrêt. À l'opposé, l'auteur insiste : l'exigence de l'existence du lien de causalité doit être considérée comme faisant partie intégrante du plus vaste débat sur les objectifs et les politiques du droit de la responsabilité civile en général. Le lien de causalité est un sujet imprégné de valeurs normatives et doit être traité comme tel.

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Introduction

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I had a feeling once about Mathematics, that I saw it all—Depth beyond depth was revealed to me—the Byss and the Abyss. I saw, as one might see the transit of Venus—or even the Lord Mayor’s Show, a quantity passing through infinity and changing its sign from plus to minus. I saw exactly how it happened and why the tergiversation was inevitable: and how one step involved all the others. It was like politics. But it was after dinner and I let it go!

*Winston Churchill*¹

Introduction

One could be forgiven for experiencing that same sense of resigned bafflement that Churchill had on confronting the equally daunting subject of causation. There are few topics in law that have generated as much literature and as much confusion as causation. Law is little different from other disciplines, like science and philosophy. Although the context and purpose may be different, the struggle is equally torturous and troubled. Indeed, the extent of elucidation and clarity achieved seems to be inversely related to the intensity and extent of analysis offered. For all the effort invested, little progress has been made in either the legal academy or the judicial ranks. Causation remains a veritable black hole that, once entered, can rarely be escaped. It has claimed the scholarly lives of almost all those who presume to have decoded or resolved its pervasive puzzles. In this regard, Churchill escaped relatively unscathed.

So why am I entering the field and running the risk of a similar fate? My approach is to reject the present paradigm within which existing theories and accounts operate both at the judicial and academic level. Rather than seek to outline some neutral or pseudo-scientific test for

1. Winston S Churchill, *My Early Life: A Roving Commission* (London: Charles Scribner’s Sons, 1930), 35.

understanding or navigating the black hole of so-called factual causation, I recommend abandoning that irresolvable and hopeless quest. By this, I mean that the mysteries of causation do not lend themselves to resolution in any analytical or pure manner. Different answers will recommend themselves depending on the context and purpose of any inquiry: what will pass argumentative muster in one situation (e.g., science) will not be appropriate for another (e.g., law). In short, I take the view that, if you ask the wrong questions about causation in torts (as most judges and scholars do) you are guaranteed to get the wrong answers. In line with this, I will develop a different approach for meeting the challenge of fixing causation in tort law. Mindful that “knowledge of facts presupposes knowledge of values,”² I insist that the requirement of causation must be understood as being entirely part of the broader debate on the goals and policies of tort law generally. Causation is a topic drenched with normative values and should be treated as such.

Most of the scholarly action concerns those situations in which there are multiple tortfeasors and the like. However, the efficacy of the “but for” test is dubious and contested for even the most basic one-on-one instances of tort liability. The most recent cases of *Clements v. Clements*³ in Canada and *Williams v. Bermuda Hospitals Board*⁴ in the United Kingdom offer testament to that; both involve a possible tortious cause and a non-tortious one. Accordingly, after introducing the present state of Canadian doctrine on causation, I examine the best, if flawed, scholarly efforts at solving the mysteries of causation; it is not my intention to offer an exhausting or exhaustive account of the existing scholarly literature. Then, after digging deeper into *Clements* and its theoretical underpinnings, I look at how causation can be dealt with as a policy matter. The final third of the essay lays out a different way of looking at tort law and how a causation rule inspired by *McGhee v. National Coal Board*⁵ might be designed that respects that approach. Throughout the essay, the ambition is to get beyond the prevailing tendency to treat causation as being an exclusively factual issue and to grasp it as a thoroughly policy-based inquiry.

2. Hilary Putnam, *The Collapse Of The Fact/Value Dichotomy And Other Essays* (Cambridge, MA: Harvard University Press, 2002), 145. This broad pragmatic claim is developed and defended in later parts of the paper. See *infra*, text at notes 40-43.

3. 2012 SCC 32, [2012] 2 SCR 181 [*Clements*]. There was a dissent by LeBel and Rothstein JJ, but it was simply about the majority’s decision to order a retrial rather than a verdict being entered in favour of the defendant.

4. [2016] UKPC 4 [*Williams*]. The case was on appeal from the Court of Appeal for Bermuda.

5. [1972] 3 All ER 1008 (HL) [*McGhee*].

I. *Cause for complaint*

A convenient place to begin is with the most recent pronouncement on causation in tort by the Supreme Court of Canada in *Clements*. The defendant crashed when a nail on the road punctured his motorcycle's tire and he was unable to retain control of his bike. At the time of the accident, he was travelling well over the speed limit and his motorcycle was considerably overloaded. His wife was a passenger and was seriously injured. She sued her husband. She won at trial, but lost on appeal as it was found that the accident might well have happened even if the defendant had not been negligent. The Supreme Court of Canada allowed the wife's appeal and ordered a new trial. The central question for the Court was whether the defendant/driver's negligence was the cause of the accident—would the accident have occurred anyway regardless of the defendant's negligence? In answering that question, McLachlin C.J. took the opportunity on behalf of the Court to re-state the preferred approach to causation in personal injury litigation that the Court had been seeking to follow, with some deviations and detours, for the past two decades or more since *Snell*—the traditional and unadorned “but for” test.⁶

After a detour of several decades, the Supreme Court of Canada managed to end up in much the same place that it began. The basic assertion of contemporary Canadian jurisprudence on causation seems to be the same as what Caesar Wright insisted upon almost seventy years ago in 1948—“cause and effect are pure questions of fact.”⁷ By this, both Dean Wright and McLachlin C.J. (the most frequent contemporary Supreme Court judge to opine on tort doctrine) are claiming that, even if its resolution is elusive and uncertain, the effort to fix a causal relation between the defendant's act and the plaintiff's harm is entirely factual in spirit and performance. Involving no normative or evaluative factors, they defend the stance that it is possible to fix a causal nexus without any resort to controversial matters of value or policy. As such, the causal inquiry can be separated entirely from matters of social justice or moral responsibility. Indeed, for Wright and McLachlin C.J., to do otherwise would be to collapse their own philosophical division between fact and value. This

6. [1990] 2 SCR 311 [1990] SCJ No 73. For an excellent and insightful account of the pre-*Clements* jurisprudence, see Vaughan Black, “The Rise and Fall of Plaintiff-Friendly Causation,” (2016) 53:4 Alta L Rev. My view is that the existing doctrine is now plaintiff-hostile.

7. Cecil Wright, “The Law of Torts, 1923–1947” (1948) 26 Can Bar Rev 46 at 58. The Supreme Court of Canada is not alone in this basic operating assumption. See the approach of the High Court of Australia in *Bennett v Minister of Community Welfare* (1993), 176 CLR 408 at 412 (Mason CJ, Deane and Toohey JJ) and *Roads and Traffic Authority v Royal*, [2008] HCA 19, 245 ALR 653 at 674 (Kirby J).

would risk severe and possibly fatal harm to their jurisprudential and judicial projects to ground an appropriate scheme of tort liability.

In *Clements*, the Supreme Court emphasized that the causation inquiry was an entirely factual one and to be based on a “robust common sense approach”; scientific precision was not required.⁸ No liability could be placed on a negligent defendant unless there was a showing of “but for” causation—the injured plaintiff has the burden to demonstrate that the accident would not have occurred but for the defendant’s negligence. It is only in exceptional circumstances that there can be an abandonment of the “but for” requirement in favour of a “material contribution to risk” approach. Such circumstances will generally only exist where there are multiple tortfeasors and when the “but for” test cannot work for them separately, but only as a group (i.e., but for the negligence of one of the group, the plaintiff would not have been injured). Accordingly, the question for a trial judge is whether it can be determined on a balance of probabilities that the plaintiff’s injuries would not have happened “but for” the negligence of the defendant.

In reaching this decision, the Supreme Court insisted that this approach was underwritten and justified by “fairness and conforms to the principles that ground recovery in tort.”⁹ These considerations were offered as a basis for both a continued reliance on the “but for” rule and the limited scope of any exceptions to it. As such, it needs to be demonstrated that “the defendant’s negligence was *necessary* to bring about the injury.”¹⁰ As for a “material contribution” test (i.e., did the defendant’s negligence make a material contribution to the risk that the plaintiff would be harmed) the Court approved of the critical view that this “does not signify a test of causation at all; rather it is a policy-driven rule of law designed to permit plaintiffs to recover in such cases despite their failure to prove causation.”¹¹ Consequently, it decided that this exceptional way of proceeding is only defensible in cases of multiple tortfeasors, not single tortfeasors.¹²

8. *Clements*, *supra* note 3 at para 9.

9. *Ibid* at para 16.

10. *Ibid* at para 8 (emphasis in original).

11. *Ibid* at para 14, citing Smith JA in *MacDonald v Goertz*, 2009 BCCA 358, 96 BCLR (4th) 236 at para 17.

12. The Supreme Court of the United Kingdom did decide that a material contribution to risk approach did apply to a single negligent employer who had exposed a plaintiff to asbestos. See *Sienkiewicz v Greif (UK) Ltd*, [2011] UKSC 10 [2011] WL 674961. The Supreme Court of Canada seems to have shifted in its understanding of what counts as “material contribution.” In earlier cases, like *Snell*, *supra* note 4, it seemed to talk more about “material contribution to injury,” not “material contribution to risk.”

Despite the Court's protestations to the contrary, this is "a radical approach" that stands in sharp contrast to much existing legal doctrine and juristic commentary.¹³ The incorporation of a necessity requirement is a regressive step in terms of the plaintiff's burden in establishing liability: the idea that causation is and can be understood as an entirely policy-free inquiry is unfounded and misleading. Moreover, the radical and regressive nature of the decision is further compounded by the almost off-hand, yet startling statement that it is "the theory of corrective justice that underlies the law of negligence."¹⁴ Both these claims by the Court are open to strong and severe disapproval. While McLachlin C.J. is right to connect tort doctrine to deeper theoretical principles, she is wrong, in terms of both descriptive accuracy and prescriptive policy, about tort law's commitment to corrective justice generally and the role of necessity in causation doctrine. Finally, the Court's reliance on a "robust common sense approach" adds intellectual insult to analytical injury; it is more an admission of explanatory failure than a genuine attempt at elucidation. Common sense is usually neither common nor sensible; it is a screen for much deeper and unrevealed preferences and practical commitments.

Accordingly, as I will show, the judgment and decision in *Clements* is wanting in so many ways. Although it is offered by the Supreme Court of Canada as the definitive and state-of-the-art word on causation in tort law, it falls well short of its lofty aim; it never really gets off the ground as a convincing account of causation. Indeed, there can be few recent decisions of the Supreme Court of Canada that have succeeded in promising so much and delivering so little. It simply defies understanding that McLachlin C.J. and the Court could think that perplexities of causation can be handled, let alone be resolved, by the discredited and simplistic "but for" test. The Court itself has actually been a stern critic of the limitations of the "but for" rule in the past.¹⁵ As such, the challenge for the critical theorist is to ignore what the Court claims that it is doing and bring to light those values and policies that actually animate the Court's reasoning and applications.

13. *Supra* note 3 at para 16. There is some support for McLachlin CJ's approach in the American Restatement. There, it is contended that the ascertainment of cause-in-fact is based upon factual necessity, not on legal policy. Moreover, although it is conceded that the "but for" test needs to be relaxed in multiple cause situations, the *Restatement* rejects a "material contribution" or "substantial factor" solution. *Restatement (Third) Torts: Liability for Physical and Emotional Harm*, (St Paul, MN: ALI, 2009, 2012). See also *Boim v Holy Land Foundation for Relief and Development*, 549 F (3d) 685 (7th Cir 2008).

14. *Ibid* at para 21.

15. See, for example, *Snell*, *supra* note 6 and *Athey v Leonati*, [1996] 3 SCR 458.

II. *Into the mystical*

Efforts to come to grips with mysteries of causation in philosophy and science are legend. Indeed, the history of Western theorizing is cluttered with efforts to crack the metaphysical code of causation. However, many have resigned themselves to a Humean scepticism that considers the analytical search for general laws of causality as a pointless endeavour; causality is about convention and experience, not logic or metaphysics.¹⁶ Nevertheless, this does not mean that judges and jurists have given up on the task of developing a workable and fact-based rule of causation that can move forward the issue of whether a defendant should or should not compensate a plaintiff for harms that have been allegedly caused by the defendant. However, the move from “a” cause to “the” cause of the accident demands an evaluative filter or standard that calls upon a range of policy values and goes beyond the supposed factual parameters of the traditional inquiry. Many tort theorists concede this and re-align their inquiry towards more focused and practical concerns.

To ask what the cause of Mrs. Clements’s injuries was is to go down a blind alley that leads everywhere and nowhere. There are so many potential causes of Mrs. Clements’s injuries that can claim some credence—her presence on the bike, his ownership of a motorbike, her marriage to Mr. Clements, the quality of the road surface, the weather conditions, and the list goes on. Of course, it is tempting to recommend that it is possible to isolate “the cause” of the accident out of the plethora of possible causes. Rather than devote their efforts to answering the open-ended inquiry into what caused the plaintiff’s harm, judges and commentators have turned their attention to answering the less open-ended, but still general inquiry into “did the defendant cause the plaintiff’s harm?” While this is a more modest project, it is no less difficult to answer with any certainty. Moreover, it immediately places the search for factual inquiry within an evaluative framework—the goals and values of tort liability. Thus, the factual test for causation is embedded in a value-laden context.

The tort theorist who has made the most progress in addressing the perplexities of this legal inquiry of “did the defendant cause the plaintiff’s harm?” is Jane Stapleton. She is by far the most sophisticated and impressive of the legal scholars who reflect upon causation in torts. Her work is always insightful, pragmatic and rewarding. Yet, for all her critical and compelling rejection of most causation theories on offer, she holds firm to the informing and dominant paradigm. She insists that it

16. David Hume, *An Enquiry Concerning Human Understanding* (Chicago: The Open Court Publishing Co, 1921), Part 7.

is important to be clear about the purpose for which a causal inquiry is made; the contexts of science and law are very different and have different objectives. However, that said, she proceeds to argue that questions of legal causation can be resolved in their own terms without reference to the broader policy goals of tort liability. She maintains that the challenge of finding a test for causation that is factual in nature and application is achievable.

Mindful that the law has been interested in and willing to impose liability on non-necessary actions, Stapleton acknowledges that this entails extending what can count as causal. This demands a reappraisal of the reach and rationale of the traditional “but for.” As such, she offers an extended and modified “but for” test that allows for contribution and involvement by way of a counter-factual/hypothetical approach:

By comparing the actual world of the particular phenomenon with a hypothetical world (which we construct by notionally omitting the specified factor and sometimes other factors) we can determine, *in the context of that comparison*, the “involvement”, if any, of the specified factor in the existence of the actual phenomenon. It is by using data such as our understanding of the physical laws of nature and evidence of behaviour that we determine whether our specified factor was involved in the existence of the actual phenomenon. That data also allow us to distinguish, on an objective basis, whether this involvement is in the form of necessity, duplicate necessity or contribution.¹⁷

While she manages to push the debate forward by separating the legal focus from the more general theoretical or metaphysical challenge of causal relations, Stapleton is unable to bring it to a convincing conclusion. Her contribution does much work, but it does not and cannot get her all the way. Indeed, her account founders on the kind of basic problem thrown up by *Clements*. Her extended “but for” test goes beyond the traditional rule by stipulating that a defendant’s negligence is a cause of the plaintiff’s harm if “but for it alone, (1) the injury would not exist or (2) an actual contribution to an element of the positive requirements for its occurrence would not exist.”¹⁸ In the *Clements* context, the two main problems with this are significant and debilitating.

First, Stapleton’s “alone” requirement smacks of exactly the kind of necessity that McLachlin C.J. references and that Stapleton claims to have

17. Jane Stapleton, “Choosing What We Mean by ‘Causation’ in the Law” (2008) 73:2 Mo L Rev 433 at 444. See also “Factual Causation” (2010) 38:3 Fed L Rev 467 [Stapleton, “Factual Causation”] and “An ‘Extended But-For’ Test for the Causal Relation in the Law of Obligations” (2015) 35:4 Oxford J Leg Stud 697 [Stapleton, “An Extended But-For”].

18. Stapleton, “An Extended But-For,” *ibid* at 714.

gone beyond; it implies a certain scientific stringency that she claims to have modified or abandoned. Secondly, the central challenge on the *Clements* facts is to determine whether there was any contribution or involvement by Mr. Clements in his wife's injuries—did the fact that Mr. Clements was driving his overladen bike too fast contribute to or sufficiently involve him in the occurrence of the accident? Was it more or less material than the tire-bursting nail? It is not that the “but for” test, extended or otherwise, rules out a finding of causation, but that it is indecisive; it begs the very question that it was designed to answer. Moreover and most importantly, there is no legitimate resource that Stapleton can call upon that will resolve that uncertainty and that remains true to the self-imposed parameters of her inquiry. Shut off from the policies or values that inform tort law, she has backed herself into an analytical corner.

Stapleton is to be applauded for unmasking “the seductive simplicity” of the traditional “but for” inquiry and for taking us beyond McLachlin C.J. and other traditional “but for” enthusiasts.¹⁹ And that is no small thing. But, lacking the jurisprudential courage of her critical convictions, she remains committed to the possibility of a fact-based account of causation and, therefore, to the “but for” test, albeit in an extended form. She takes the important step of justifying her extended “but for” test by reference to the law's policies and interests in imposing tort liability on actions that are non-necessary, but she seeks to curtain off those same policies when she formulates and applies her neo-traditional approach to causation. Consequently, the challenge for those who take seriously the idea that the facts of legal causation are beholden to and permeated with the policies and values of tort law is to offer up a reinvigorated causation inquiry that respects and incorporates those same policies and values.

III. *A false corrective*

Ironically, although McLachlin C.J. insists that the causation inquiry in tort law is exclusively a matter of necessity and fact, she justifies that conclusion in terms of “fairness and...the principles that ground recovery in tort.”²⁰ More precisely, she contends that the traditional “but for” test is a corollary of “the theory of corrective justice that underlies the law of negligence.”²¹ Her major and only source for what that theory entails is the celebrated work of Ernest Weinrib, the doyen of corrective justice advocates. However, Weinrib himself is no defender of the traditional rendition of the “but for” test as the most fitting component of a corrective

19. Stapleton, “Factual Causation,” *supra* note 17 at 476.

20. *Clements*, *supra* note 3 at para 16.

21. *Ibid* at para 21.

justice account of tort law. While he does insist that “what must be shown with respect to each bilateral pairing is that the unreasonable risk created by a particular defendant matured into injury to a particular plaintiff,”²² he does not demand that this entails a traditional “but for” test. Instead, he offers a more capacious and value-based account of what counts as a sufficient causal connection.

Although the requirement of a factual causal nexus between the defendant’s act and the plaintiff’s harm is central to his formalist scheme of tort law, Weinrib is not forthright or expansive in demonstrating how that nexus will be established with sufficient exactness in practical circumstances. However, he does tip his hand when he responds to suggestions that the difficulties of proving causation by traditional methods (i.e., the “but for” test) have led to innovations that involve the shifting of burdens of proof from plaintiffs to defendants. He comments that such proposals “merely modify the evidentiary mechanisms regarding causation without negating its systemic importance for tort liability.”²³ Consequently, Weinrib is far from wedded to a traditional “but for” test as the basis of a scheme of tort law built upon notions of corrective justice.

Indeed, in a recent article, Weinrib has developed much further and more directly the kind of causation rules that are necessitated and justified by his formalist theory of tort-law-as-corrective-justice. For our purposes, it is sufficient to report that Weinrib remains unpersuaded by the need to adhere to a strict rendition of the traditional “but for” test. He chastises the Supreme Court for its “incompletely successful efforts” in *Clements* and concludes that, like the English jurisprudence, Canadian doctrine is “tied up in knots.”²⁴ His is a more subtle and nuanced analysis than the Supreme Court’s and one that refuses to be one-dimensional in its inquiry into and resolution of the uncertainties of causation. Consequently, the Court’s invocation of corrective justice by way of Weinrib to defend its continuing attachment to the “but for” approach is unwarranted and ungrounded. Even if tort law is built on corrective justice foundations (and I strongly maintain that it is not and should not be), this philosophical theory neither demands nor recommends adherence to a traditional and simplistic “but for” test.

22. Ernest Weinrib, “Causal Uncertainty in Negligence Law” (2015) 36:1 Oxford J Legal Stud 1 at 1-2 [“Causal Uncertainty”].

23. Ernest Weinrib, *The Idea of Private Law* (Cambridge, MA: Harvard University Press, 1995).

24. Weinrib, “Causal Uncertainty,” *supra* note 22 at 1, 4. Interestingly, while the article uses *Clements*, *supra* note 3 as an introductory hook and canvasses a range of multiple cause situations, he does not deal with the kind of situation that arises in *Clements*.

As both the common law and the Supreme Court of Canada continue to recognize, there are several circumstances in which tort liability is imposed without there being a necessary causal linkage established between the defendant's act and the plaintiff's harm. In exceptional circumstances, liability is imposed where there is no link at all. Examples of these instances include: (1) when it is not possible to determine which of two negligent defendants caused the plaintiff's harm, (2) when there is strict liability or vicarious liability, and (3) when there is an intervening act by a third party. In each of these instances, the finding of tort liability has been upheld because there are compelling values or policies in tort law that warrant liability and outweigh the demand for there to be a proven "but for" connection between the defendant's act and the plaintiff's harm.

Indeed, there is not only nothing in McLachlin C.J.'s judgment that explicitly denies this, but there is also express confirmation that the imposition of liability without there being a necessary causal linkage between the defendant's act and the plaintiff's harm can still be very much part of the law. For instance, despite her efforts to justify *Cook v. Lewis*²⁵ in terms of the "but for" test, the fact is that McLachlin C.J. is willing to impose liability on a defendant who, as in that case, did not have a proven causal connection, necessary or non-necessary, to the plaintiff's harm. Further, she confirms that a defendant can be found liable where there is a definite and proven lack of causal connection; only one of the defendants, not both, could have fired the gun that harmed the plaintiff. Her rationale for so doing justifies a much broader scope of tort liability where the defendant has a non-necessary connection to the plaintiff's harm:

Compensation for injury is achieved. Fairness is satisfied; the plaintiff has suffered a loss due to negligence, so it is fair that she turns to tort law for compensation. Further, each defendant failed to act with the care necessary to avoid potentially causing the plaintiff's loss, and each may well have in fact caused the plaintiff's loss. Deterrence is also furthered; potential tortfeasors will know that they cannot escape liability by pointing the finger at others.²⁶

Where McLachlin C.J. does hold the line is when the defendant's act is not proven to be a necessary condition of the plaintiff, but merely makes a material contribution to the risk of harm to the plaintiff. But this makes little sense when it is appreciated that she would be prepared to hold a negligent defendant liable, as in *Cook*, even when it is known that there

25. *Cook v Lewis*, [1951] SCR 830, [1952] 1 DLR 1 [*Cook*]. The American equivalent of *Cook* is *Summers v Tice*, 199 P(2d) 1 (Cal 1948).

26. *Clements*, *supra* note 3 at para 41.

is no causal connection at all between that defendant's act and the plaintiff's harm. The pressing challenge is to explain why it would be fair or just, even on corrective justice terms, to put a negligent defendant who did not cause harm in a worse position (i.e., being held liable) than a negligent defendant who might have caused harm? One of the *Cook* defendants was presumed to be liable even though he did not cause harm to the plaintiff, but the *Clements* defendant who might well have caused or contributed to the plaintiff's harm might not be liable.

It is the burden of the rest of this essay to explain and justify an approach to causation that links and integrates the debate about the goals and principles to be served by tort law and the nature of a causation requirement. This ambition is not opposed to McLachlin C.J.'s stance, but actually builds on its implicit and animating intention. Of course, the debate about the goals and principles to be served by tort law is the very stuff of heated controversy. Chief Justice McLachlin's view carries weight and might well convince some either by way of authority or persuasion, but it is not the final word. Not surprisingly, I will offer a different account of tort law's values and purposes. Corrective justice is part of the story, but only one part of it

IV. *After the fact*

The House of Lords that has offered a much more progressive, pragmatic and realistic account of causation than the Supreme Court of Canada. In *Kuwait Airways*, both Lords Nicholls and Hoffmann recognised that the appropriate test for causation is intimately connected to the policy reasons for imposing any tort liability on the defendant. Lord Nicholls observed that, because "the court may treat wrongful conduct as having sufficient causal connection with the loss for the purpose of attracting responsibility even though the simple 'but for' test is not satisfied, the court is primarily making a value judgment on responsibility."²⁷ Lord Hoffmann was even more expansive. Although he was clear that there must be some causal connection between the defendant's act and the plaintiff's harm, the nature and demonstration of that connection can vary widely depending on the circumstances. Sometimes, a necessary link is required; at other times, it may be enough to show that there is a non-necessary connection that simply added to the probability that the plaintiff would be harmed:

27. *Kuwait Airways v Iraqi Airways*, [2002] UKHL 19 at para 74 (Lord Nicholls). It should be noted that this was a conversion case, not a negligence one.

There is therefore no uniform causal requirement for liability in tort. Instead, there are varying causal requirements, depending upon the basis and purpose of liability. One cannot separate questions of liability from questions of causation. They are inextricably connected. One is never simply liable; one is always liable for something and the rules which determine what one is liable for are as much part of the substantive law as the rules which determine which acts give rise to liability.²⁸

These views were repeated by Lord Hoffmann in *Gregg v. Scott*.²⁹ There, he talked about the need for a “sufficient” causal link between the defendant’s act and the claimant’s harm. Indeed, he confirmed that causation is “no longer a question of all or nothing, but one of sufficiency.”³⁰ This approach was confirmed by the most recent decision of the Judicial Committee of the Privy Council. Drawing on precedents as far back as 1956,³¹ the Committee placed material contribution at the heart of its approach to the role of causation in the imposition of tort liability.

In *Williams*,³² the plaintiff went to hospital with acute appendicitis. He was operated on later that day, but suffered severe complications. Due to the negligence of the hospital staff, the operation had been considerably delayed. The issue was whether the complications were caused by the delay or whether it was a result of his existing condition on his arrival at the hospital. In short, did the negligence cause his complications or not? Relying on a traditional “but for” test, the trial judge found that the negligent delay had not caused the complications. On appeal, a more expansive approach was adopted and the plaintiff succeeded in his claim against the hospital. Before the Judicial Committee of the Privy Council, the appeal by the hospital was dismissed and the plaintiff’s claim vindicated. The central legal question in issue was the proper test for establishing causation in such circumstances. The Committee held that, as a matter of law and policy, the “material contribution” approach applied. The hospital was, therefore, liable even if there was no definitive explanation of what actually caused the plaintiff’s complications: the conclusion was that there was sufficient evidence to support the finding that the defendant’s delay either might have caused or contributed to the plaintiff’s harm.

In contrast to *Clements*, it was enough in *Williams* to meet the causation requirement to show that the defendant’s negligent act might have contributed to the plaintiff’s harm; no necessary connection was

28. *Ibid* at para 128 (Lord Hoffmann).

29. *Gregg v Scott*, [2015] UKHL 2.

30. *Ibid*.

31. *Bonnington Castings Ltd v Wardlaw*, [1956] AC 613.

32. *Supra* note 4.

required. It could be clearly asserted that the defendant's negligent act did not help the situation and that it passed a threshold of being a possible cause. Indeed, there was strong evidence that the defendant's negligent act might well have worsened the plaintiff's condition, even if it did not cause it in any original or necessary sense. So, on the facts of *Clements*, a similar approach would point towards the imposition of tort liability as the defendant's negligent acts might have made a contribution to the accident, increased the likelihood of an accident or led to more serious harm to the plaintiff. If the defendant had not been speeding on his over-loaded bike, he might have been better able to deal with the effects of the burst tire and avoid the accident or moderate its consequences.

However, for my purposes, the main force of both *Kuwait Airways* and *Williams* is twofold. First, the English courts categorically reject the idea that a "but for" test is the only or exclusive test for determining causation in tort cases; causation is about sufficiency and contribution as much as necessity. The traditional "but for" test has a role to play, but it is part of a broader and more encompassing set of rules and principles. Secondly, the rationale for that more expansive approach is the commitment to developing a causation test that best fits the goals and principles that comprise and underwrite the whole scheme of tort law generally. The need to establish a causation test does not stand aside from the other requirements for tort liability (i.e., duty of care, standard of care, remoteness, etc.); it is not a purely factual inquiry that is divorced from more normative concerns. Instead, causation is to be integrated into the overall framework for justifying the imposition of tort liability on negligent defendants in favour of injured plaintiffs. It is to that task of proposing a better approach that I now turn.

V. *Risk and relief*

It has been often and well stated that tort law is "a battleground of social theory."³³ Precedents, politics, personalities, philosophy, production patterns, and much more vie for dominance in more or less conspicuous ways. Like most theoretical debates and unlike many of its participants' assertions, there is no external or objective vantage from which to enter or contribute to the tort debate. Consequently, I offer an account of tort law's policies and values that is intended to be defensible both in terms of social justice and in terms of existing case law. As such, my account makes no

33. William Prosser & Werdner Page Keeton, *Prosser and Keeton on the Law of Torts*, 5th ed (St Paul: West Publishing Company, 1984) at 15. Allan C Hutchinson, *The Province of Jurisprudence Democratised* (Oxford: Oxford University Press, 2008) at 10-15. Sandy Steel, *Proof of Causation in Tort Law* (New York: Cambridge University Press, 2015).

extravagant claims about its analytical truth or philosophical authority; it is simply put forward as a principled intervention in an unfolding ideological engagement.³⁴

Today's industrial and technological world is complex and interdependent. While this has led to an improved standard of living for many, the capacity to wreak havoc has also increased in both scale and gravity. It is a world of considerable risk and harm. As well as direct threats to people's health and welfare, there is a whole host of risks that work separately, cumulatively, and in tandem to produce a hazardous and often toxic environment. Tort law is one of the ways that society confronts and responds to those risks and their consequences.

The annual burden that injury places on Canadians, the health care system, and society generally, is immense. In 2004, there were 13,677 deaths, over 211,000 Canadians were hospitalized, three million emergency room visits made, over 67,000 Canadians left permanently disabled, \$10.7 billion lost in health care costs, and \$19.8 billion wasted in total economic costs. As regards non-intentional injuries (i.e., not including suicide), transport incidents were the leading cause of injury and deaths at 34 per cent.³⁵ Many of these victims received no or meagre compensation. While the existence of insurance moderates the situation somewhat, over 50 per cent of the relatively small amount of compensation paid out is invested in administering and financing its recovery, mainly to lawyers.

The common law has opted to treat the regulation of risk and the compensation of injury as flip-sides of the same troublesome coin. This is amply evidenced in *Clements* where McLachlin C.J. emphasizes the bilateral and integrated nature of these two factors—"the basis for recovery, sometimes referred to as 'corrective justice', assigns liability when the plaintiff and defendant are linked in a correlative relationship of doer and sufferer of the same harm."³⁶ Consequently, tort law is considered to be a prime vehicle to achieve this vision of corrective justice. Plaintiffs must pinpoint the particular and discrete sources of risk that gave rise to their harm or else they will be ineligible for compensation. Yet this narrow and

34. For an extended defence of this position, see Hutchinson, *The Province of Jurisprudence Democratised*, *supra* note 33 at 10-15. Too much contemporary writing on causation in tort law is motivated by a need to rationalize existing doctrine. The basic and boot-strapping move is to defend the general appropriateness of the "but for" test and then to justify some major deviations from it. See, for example, Steel, *supra* note 33. Some even go so far as to say that the present confusion is "unnecessary and easily remedied." Sarah Green, *Causation in Negligence* (Oxford: Hart Publishing, 2015).

35. SMARTRISK, *The Economic Burden of Injury in Canada* (Toronto: SMARTRISK, 2009). More up-to-date reliable and comprehensive data are difficult to find.

36. *Clements*, *supra* note 3 at para 7.

blinkered view of tort law is dictated neither by legal theory nor legal doctrine. Tort is and can be a much more expansive and progressive regime than that posited by corrective justice. Indeed, the history of tort law and its theoretical underpinnings recommend that distributional values and policy commitments are as important as corrective ones.

Little in tort doctrine or tort theory demands that the regulation of risk and the compensation of harm be seen as giving rise to a mutually-reinforcing set of questions and, in particular, to a series of all-encompassing answers. How and whether the two enquiries are connected is tied to why they are to be connected in the first place. While there may be some inevitable overlap, it is surely the case that the regulation/deterrence issue gives rise to a different range of considerations from the compensation issue. To ask two different questions and to expect that the same answer will be appropriate to each is a serious error. There will be obvious instances in which society will wish to deter conduct that creates unacceptable risk, even if it is not entirely clear that it results in actual injury. Similarly, there will be obvious circumstances in which society will wish injured persons to receive compensation, even if the precise source of risk is unclear or unknown. To use the same and single blunt instrument to affect both a process of fair compensation and a scheme of appropriate regulation is to portend error and misjudgment.³⁷

VI. *Taking policy seriously*

There are numerous factors that influence the fairness of any tort doctrine that cannot be comprehended or appreciated by the abstraction and formality of the type of corrective justice championed by McLachlin C.J. and her concurring colleagues on the Supreme Court of Canada. For instance, the identity of the different actors in the legal drama has a significant and undeniable effect on their relative responsibilities and duties. The fact that the plaintiff is most often an ailing individual and the defendant is often a large and commercial entity or that large insurance companies stand behind much litigation are factors that can only be ignored or marginalized at the inevitable cost of fundamentally misrepresenting the worlds of accidents and harms.³⁸ While these matters ought not to drive

37. Of course, it might well be that the best response to this dilemma is to reject tort law entirely. However, this essay proceeds on the basis that tort law is here to stay. Therefore, the challenge is how to develop the causation requirement in the least worst way possible.

38. A good example of that is the "social host" case of *Childs v Desormeaux*, 2006 SCC 18, [2006] 1 SCR 643. This decision can only be fully appreciated in terms of the insurance arrangements in place. The only reason that the injured plaintiffs sought recovery from the social host was that the insurance limits of the primary tortfeasor, the drunken driver, had already been reached and there still remained a large deficit in the damages recovered.

entirely the development and structure of tort law, they ought not to be rendered irrelevant either; a corrective justice approach does that.

By treating injured individuals as being comparable in their circumstances, in their behaviour, and in their vulnerability as profit-making corporations is not only neglectful, but also unjust. The formalistic insistence of talking about tort law, negligence and causation as involving a paradigmatic and bipolar equation between A and B defies any reasonable or defensible sense of law as any kind of vehicle for obtaining and advancing social justice. It is neither neutral nor objective to posit litigants in personal injury litigation as being equivalent or faceless characters. For corporate defendants, the cost of accidents is simply that—an economic cost and calculation.³⁹ For plaintiffs, the costs of accidents are much more personal, physical and irremediable. The most that tort law can do to defendants is to ask them to quantify the costs of accidents and their prevention in monetary terms. The least that tort law can do is to ask plaintiffs to value their injuries in monetary terms alone. This is an ill-balanced and misleading equation of equality; corrective justice is comparing apples and oranges, with tragic consequences not only for injured individuals, but also for society at large.

Also, it is important to understand that the individualized focus of the common law is ill-suited to the world of contemporary risks and accidents. Most serious illnesses, as well as many injuries, are attributable to a whole host of interactive conditions and circumstances. Rather than being unique and dichotomous, the modern world of risk and accidents is probabilistic and continuous. Agent Orange, Bhopal, DES, Chernobyl, the Dalkon Shield, and tainted blood supplies created situations in which the traditional “but for” causation test is hopelessly inadequate. The unfathomable interaction of different causes prevents the isolation of particular causes for particular injuries: the best that can be achieved is a general correlation of acts and consequences in terms of their statistical aggregation and impact. The attribution of responsibility is simply a conclusion based on a rebuttable hypothesis of a probabilistic generality. Against such an understanding, it is grossly unfair to plaintiffs to persevere with the customary individualized rules and procedures for recovery. Many

39. This is the basic message of the Learned Hand test. See *United States v Carroll Towing Co*, 159 F (2d) 169 (2nd Cir 1947). It is worth noting that law-and-economic scholars are willing to dispense with or downgrade the need for a strict causation test. See for example, William M Landes & Richard A Posner, *The Economic Structure of Tort Law* (Cambridge: Harvard University Press, 1987) at 229. Guido Calabresi, “Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr” (1975) 43 U Chicago L Rev 69. However, an approach that concentrates on the least cost-avoider does not so much do away with the causation requirement as submerge or hide it within that inquiry.

plaintiffs, as opposed to defendants, are in no position, either evidentially or financially, to overcome the uncertainty and indeterminacy of causal evaluations that lie at the core of modern accidents; they are victimized again by the tort system. As such, a continuing attachment to traditional tort doctrine, especially in regard to causation, is inimical to social justice in the contemporary world of risks and harms. The narrow and abstract focus of a corrective justice approach exacerbates the situation.

Instead of a corrective approach, tort law and theory is much more multi-faceted, multi-valenced and multi-layered. Like much else in law, the structure and development of tort doctrine is a classic example of the common law's tendency for "muddling through."⁴⁰ There is no one simplistic thread that ties it all together; it a normative quilt of many different strands and themes. At different times and in different ways, it has prioritized a range of disparate values and competing policy commitments—moral responsibility, economic efficiency, risk prevention, distributive justice, entrepreneurial innovation, just desserts, fair compensation, and more. The history of tort law shows that each of these values and aims has played some role, to a lesser or greater extent, in the formulation of basic doctrine and its details. The assertion that there is some consistent or unifocal approach is simply unconvincing; most theories, including a corrective justice approach, can claim some plausible degree of fit and justification in the voluminous jurisprudence of tort law.⁴¹ But no one theory can assert intellectual or normative hegemony.

Against this backdrop, a central question to be decided is how to balance the worlds of risk and harm. In particular, it has to be asked in what circumstances should the creator of risks be required to compensate for any harms that might be attributable to those risks. This is where the causation inquiry becomes particularly acute. The compulsion to treat causation as a factual matter runs afoul of the mandate to treat causation as something that is to be determined as part of the overall policy basis for tort liability. However, understood in a more pragmatic way, the most appropriate question to be answered is not what was the cause of the plaintiff's harm. Nor is it whether the defendant's act was the cause of the plaintiff's harm. And nor is it even whether the negligent defendant's act was the cause of the plaintiff's harm. The pressing question for tort liability is: *Was the existence of the defendant's negligent act a sufficient*

40. See Allan C Hutchinson, *Evolution and the Common Law* (Cambridge: Cambridge University Press, 2005), 235-270.

41. One of the best surveys remains Izhak England, "The System Builders: A Critical Appraisal of Modern American Tort Theory" (1980) 9:1 J Leg Stud 27.

*reason in terms of realizing tort law's broad range of policies to warrant imposing liability on the defendant for the plaintiff's harm?*⁴²

This is not an isolated inquiry that stands apart from the other details of the case or context. It looks to all the facts of the accident and reaches a conclusion based on how the various policy values of the law can best be served or advanced. Of course, differences of opinion about tort law's aims and commitments will manifest themselves in differences about how that inquiry can be considered and resolved. Of course, it seems entirely sensible to insist that, without some connection between the defendant's act and the plaintiff's injury, there should be no liability placed upon a defendant. This would apply no matter how negligent the defendant may have been or how injured the plaintiff might be. However, this does not explain what the nature of that connection is or how it can be proven to the court's satisfaction. What does explain how that is to be characterized and demonstrated is the policy approach taken to the imposition of tort law generally. So an attachment to corrective justice will offer a narrow test of causation, whereas a commitment to a broader and more pluralistic range of policy ambitions will recommend a more expansive and less pinched account of causation.⁴³ It is to such a policy-based approach to causation that I now finally turn.

VII. *Shifting over*

The instances in which it is possible to prove clearly that the defendant's negligent act did or did not offer a sufficient reason for imposing liability to the plaintiff on the defendant are not the stuff of controversy. They can be easily and commonly dealt with by most approaches, even if there are marginal disagreements over the size and character of these matters. However, the challenge of any test is to offer assistance and guidance when the facts or circumstances are difficult or unclear. This is exactly the situation in cases like *Clements* and *Williams*. As I have contended, the traditional "but for" test is of no practical value in such situations as it either over- or under-determines what possible causes are included or excluded. More significantly, when it is understood as a rule of exclusion as well as inclusion as it is in *Clements* and *Williams*, the "but for" test cuts in very stark and partial lines; it will exclude most cases that fall into the

42. My approach is not new. See Walter Blum & Harry Kalven Jr, *Public Perspectives on a Private Law Problem: Auto Compensation Plans* (Boston: Little, Brown, 1985) at 8-12. The seminal piece on the insoluble relation between fact and policy in tort causation is Wex Malone, "Ruminations on Cause-in-Fact" (1956) 9:1 *Stan L Rev* 60. Of course, the corollary of this approach is the abandonment of tort law entirely.

43. That difference in approach to causation is what lies at the heart of the contrast between Canadian and English jurisprudence. See *supra*, text at notes 27-31.

largest group of litigated cases, the not-sure category. Under a traditional “but for” rule, the plaintiff has the burden risk of non-persuasion, so a lack of knowledge about the operation or sequencing of the particular facts will count disproportionately against plaintiffs. It will be defendants who are the fortunate beneficiaries of this institutional and normative asymmetry.

The culprits are many in this doctrinal villainy. But a major one remains Holmes’s enduring pronouncement that “the general principle of our law is that loss from accidents must lie where it falls.”⁴⁴ Of course, modern tort law comprises a set of rules and exceptions that explain and justify an “unless” condition. So, for example, the plaintiff must demonstrate, if losses are not to lie where they fall and are to shift from the plaintiff to the defendant, that there is some fault on behalf of the defendant that warrants the imposition of liability on the defendant. This is where causation, among other things, comes into play. Even if the defendant is considered to have owed a duty of care to the plaintiff and to have breached that duty by acting negligently, the defendant will not be liable unless the defendant is found to have caused the plaintiff’s injuries. Holmes’s principle puts the onus on the plaintiff to prove such a causal connection. If the plaintiff cannot do this, the claim will fail. This means that in circumstances where it is not known what caused the plaintiff’s injuries, the plaintiff will lose. This may seem entirely fair until it is appreciated that this range of unknowns is vast.

Yet, in some situations, some courts have not allowed the “but for” test’s structural unfairness to prevail. Indeed, even McLachlin C.J. and the Supreme Court of Canada conceded this. *Cook* is the prime exhibit; two negligent defendants were considered to be capable of both being liable to compensate the plaintiff even though only one of the defendants’ acts caused the plaintiff’s harm; two hunters fired, but only one hit the plaintiff.⁴⁵ But this concession intimates that tort law is dedicated to achieving a pluralistic range of normative ambitions in organizing tort doctrine. The question is less whether the “but for” test should be set aside, but how and when it is to be set aside. To put it bluntly, in what situation should the “but for” test be set aside so as to ensure that unfairness is not perpetuated by the rules for imposing liability on defendants and for providing compensation to plaintiffs?

My response to that is clear. It is based on two primary points of relative capability. The first is that defendants are often (but not always, of course) in a better position than plaintiffs to overcome that uncertainty; the lack

44. Oliver Wendell Holmes Jr, *The Common Law* (Cambridge, MA: Harvard University Press, 2009) at 87.

45. See *Cook*, *supra* note 25.

of knowledge about the effects of certain products, actions or processes is more directly and appropriately resolvable by those who engage in them and profit from them. The second is that defendants, as a group, are often (but not always, of course) in a better position through resources and/or insurance to absorb and re-distribute the amount of compensation paid to plaintiffs. In contrast, plaintiffs are less able to re-distribute their losses. Their injuries remain the same, no matter what the extent of the plaintiffs' compensation or even their own insurance; monetary compensation does not alter, even if it cushions the physical effects of their injuries. Accordingly, there needs to be a re-calibration of the adverse effects of "unknown" situations so that their burden is more evenly shared among plaintiffs and defendants. As one Canadian judge squarely put it, "if causation is overwhelmingly difficult to prove or impossible to prove then it is a matter of public policy or justice that it is the creator of the risk who should be put to the trouble of hurdling the difficulty or bearing the consequences."⁴⁶

In line with this policy, a *McGhee*⁴⁷-based initiative recommends itself as an equitable and policy-based response. The answer to the central question—was the existence of the defendant's negligent act a sufficient reason in terms of realizing tort law's broad range of policies to warrant imposing liability on the defendant for the plaintiff's harm?—can be divided into two parts:

- First, plaintiffs have to prove that they have suffered harm and that their harm is consistent with the kind of harm that the defendants' negligent act might bring about; this can be done by showing that the defendants' negligent act was involved in or might have contributed to the accident that resulted in the plaintiffs' harm; and
- Secondly, on the proof of such matters, the onus will shift to defendants to demonstrate that their negligent act was not involved in or contributed to the plaintiffs' injuries. Unless the defendants can show this, they will be held liable.

In particular, this approach builds on the acceptance by many judges that they are "not engaged in ascertaining ultimate verities" or anything like it.⁴⁸ Instead, they are in the business of administering justice. In unresolvable circumstances of causal uncertainty, it is surely fairer that

46. *Newsco Well Service Ltd v Canadian Propane Gas and Oil Ltd* (1981), 122 DLR (3d) 228 7 Sask R 291 at para 60 per Bayda JA. See also *Letnik v Municipality of Metropolitan Toronto* (1988), 49 DLR 707 82 NR 261 at 723-724 (MacGuigan J).

47. *Supra* note 5. Even Weinrib countenances this possibility. See *supra*, text at notes 22-24.

48. *Hickman v Peacey*, [1945] AC 304 at 318 per Viscount Simon LC.

a negligent actor should carry the weight of non-persuasion as against a relatively blameless and injured person. Provided that the plaintiff leads some prima facie evidence about the creation of risk, the existence of a duty of care to the plaintiff, and the occurrence of a possible harm to the plaintiff, plaintiffs should be entitled to recover and defendants should not be permitted to escape liability through lack of any definitive finding of causation. Any other rule would mean that plaintiffs would *always* lose whenever there was doubt, as there inevitably will be, about the “but for” link between the defendant’s act and the plaintiff’s injury. Moreover, my proposal would redress the equitable balance; plaintiffs would occasionally, but by no means always, win and defendants would occasionally, but by no means always, lose. How the test is applied in detail will, of course, represent the policy preferences of the judge and the circumstances.

This proposal builds on rather than rejects McLachlin C.J.’s view in *Clements* that a material contribution test “is a policy-driven rule of law designed to permit plaintiffs to recover in such cases despite their failure to prove causation.”⁴⁹ It is simply wrong to assert, as she does, that it “does not signify a test of causation at all.”⁵⁰ It is very much a test of causation; it is simply not a supposedly or exclusively factual one. Instead, it more directly incorporates and addresses the values and commitments to fairness that actually drive and animate the Supreme Court’s reliance on a “but for” rule that is supposedly factual in nature and application. Also, if the judgment in *Clements* is to be taken seriously, my approach advances those policy reasons that warrant the Chief Justice’s reasons for allowing for an exception to the “but for” test in the case of multiple tortfeasors. Her mistake is not in relying on such values, but on unduly confining them only to the context of multiple tortfeasors:

Compensation for injury is achieved. Fairness is satisfied; the plaintiff has suffered a loss due to negligence, so it is fair that she turns to tort law for compensation. Further, [the] defendant failed to act with the care necessary to avoid potentially causing the plaintiff’s loss, and may well have in fact caused the plaintiff’s loss. Deterrence is also furthered; potential tortfeasors will know that they cannot escape liability by pointing the finger at others.⁵¹

In *Clements*, a shift in focus and emphasis away from the “but for” rule would reap considerable dividends and come closer to effecting real and

49. *Clements*, *supra* note 3 at para 14, citing Smith JA in *MacDonald v Goertz*, *supra* note 11 at para 17.

50. *Ibid.*

51. *Clements*, *supra* note 3 at para 41.

substantive justice. On the facts, it was simply unknowable whether the defendant's negligence or the nail was the exclusive "but for" source of the plaintiff's injuries. Instead, under my proposal, the plaintiff would need to show that the defendant's negligence (i.e., driving an overloaded bike too fast) could well have resulted in the kind of injuries that she suffered. It would then be on the negligent defendant to lead convincing evidence to the court that such a supposition was unlikely. Driving an overloaded bike too fast is an act that needs to be discouraged; it was an accident that, at a minimum, was waiting to happen. As between the negligent defendant and the blameless plaintiff, therefore, the benefit of the doubt (i.e., placing the risk of non-persuasion on the defendant) should go to the plaintiff. Justice is surely better served by such an outcome.

Similarly in *Williams* much the same analysis can be followed. On the facts, it was unknowable whether the cause of the plaintiff's injuries was the defendant's negligence or some other pre-existing cause. To pretend that an extended "but for" approach can resolve matters is merely wishful thinking. Again, therefore, it seems entirely reasonable in such circumstances to put the weight of non-persuasion on the negligent defendant as opposed to the blameless plaintiff. Once the plaintiff has shown that his injuries are consistent with the type of negligent act done by the defendants, then the defendant can offer evidence to demonstrate that this is not the case. In the event of not being able to do so, the defendants will be liable. Moreover, this will provide an incentive to defendants, like the hospital and the medical establishment generally, to avoid future delays and/or to develop means by which to identify the causative pathways of different medical harms. Also, this is surely a fairer and more acceptable outcome than simply letting the defendants walk away from the possible effects of their negligence.

Some might contend that my proposal obliges the common law to implode by making it into a thoroughly open-ended policy debate between judges. However, this assumes that the common law is not already such a process when it is. Despite claims to preserve the "but for" test as a factual algorithm, the present doctrine is a convenient screen that hides, not obviates, the need for engagement over the best policies to follow and operationalize.⁵² My proposal brings that debate out into the open by putting the decisive policy-choices of judges at centre-stage. As such, the contribution of my proposal is not to introduce policy into the common law doctrine of causation, but to come clean on the idea that the common law,

52. Allan C Hutchinson, *Towards an Informal Account of Legal Interpretation* (Cambridge: Cambridge University Press, 2016), chapter 9.

even in its most doctrinal and technical moments, is a policy-driven and value-laden practice. As things stand, the common law does not finesse policy conflicts, but only hides them.

Conclusion

While it is foolhardy (and unnecessary) to suggest that my proposal offers “a benevolent principle [which] smiles on...factual uncertainties and melts them all away,”⁵³ it does make practical progress and offers policy continuity. It seeks to ensure that the effect of there being a large range of circumstances in which the demonstrable cause of the plaintiff’s harm is unknown or unknowable does not fall disproportionately on plaintiffs. The resort to the negligent acts of the defendant as a tie-breaker both makes more doctrinal sense and leads to less substantive injustice. If the search for a test of factual causation is as doomed as I have suggested, then the only way to avoid the fate of most scholars and judges who persist in that search is to abandon it entirely. A more satisfying and resolvable pursuit is to incorporate causation fully and fairly into the overall policy framework and rationale of tort law generally. Churchill might well have approved of that, before or after dinner.

53. *Fitzgerald v Lane*, [1987] 2 All ER 455 at 464 per Nourse LJ (CA Civ Div).